

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 62696-5-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
MICHAEL JOHN RELFE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: March 15, 2010
_____	)	

BECKER, J. — The State charged Michael Relfe with assault in the first degree based on a road rage incident that began with an obscene gesture and ended in Relfe shooting James Lee. Relfe claimed that he acted in self-defense. A jury convicted Relfe as charged. Relfe appeals, arguing the to convict instructions for first and second degree assault were defective because they omitted the absence of self-defense as an element of the offense, the trial court erred in refusing to instruct the jury on third degree assault, the prosecutor's closing argument misstated the law of self-defense, and imposition of a firearm penalty enhancement violated double jeopardy. In his pro se statement of additional grounds for review, Relfe also challenges the sufficiency of the evidence. We reject each contention and affirm.

## FACTS

While they were stopped at a traffic light, Relfe and Lee exchanged obscene hand gestures. Lee was driving a flatbed truck, and Relfe was driving a small car. Lee sideswiped Relfe's car on the driver's side. In a taped statement to police, Relfe said that he followed Lee to get his license number. According to Relfe, they stopped on the side of the road three times during the pursuit and at each stop Lee got out of his truck, reached into Relfe's car, and physically assaulted him. Relfe said that the last time, Lee "stuck half his body inside my car again and started manhandling, beating me, slapping me and hitting me. At which point, I had my revolver on the passenger seat and to protect myself, I was in fear of my life, I used it." When Lee saw the gun, he turned around and began to leave. Relfe fired one shot, hitting Lee in the back. Relfe told police that he intentionally shot Lee. He also stated that he felt threatened and that his intention was just to scare Lee. Relfe's statement included the following exchange:

DET: Now when you shot him, what was, what were your intentions when you used your weapon?

[Relfe]: Just to scare him.

. . . .

DET: Okay when you shot your revolver, were you . . .

[Relfe]: I wasn't aimin at him.

DET: Okay.

[Relfe]: I was just, I just pointed it.

DET: You pointed it.

[Relfe]: Yeah.

DET: In his direction though.

[Relfe]: Well yeah, to scare him.

The first trial resulted in a hung jury. At the second trial, the jury convicted Relfe as charged. On appeal Relfe argued that the State elicited impermissible opinion testimony from a detective. This court affirmed the conviction. State v. Relfe, noted at 128 Wn. App. 1048 (2005). Relfe filed a personal restraint petition, claiming that his trial counsel was ineffective in failing to request a jury instruction on second degree assault. Because there was no legitimate reason to not request an instruction on second degree assault based on the facts of the case, this court granted the petition and reversed and remanded for a new trial. In re Personal Restraint of Relfe, noted at 138 Wn. App. 1032 (2007).

At this third trial, the jury was instructed on first degree assault and second degree assault, as well as self-defense. The jury convicted Relfe as charged of first degree assault and returned a special verdict that Relfe was armed with a firearm when he committed the assault. The standard range for the offense, with a mandatory five year firearm enhancement, was 153 to 183 months. The trial court imposed a sentence of 120 months after finding that, to a significant degree, Lee provoked the incident.

Relfe appeals.

### To Convict Instruction

Relfe contends that the to convict instructions for first and second degree assault were defective because they omitted the absence of self-defense as an element of the offense. The argument fails.

In State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991), the court rejected the same argument and concluded that giving a separate instruction on self-defense, which included the State's burden of proof, is the better approach. Accord State v. Acosta, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984). Here, instruction 20 informed the jury that the State has the burden of proving the absence of self-defense beyond a reasonable doubt and that if the State did not meet this burden, the jury must return a verdict of not guilty. The jury was also instructed to consider the instructions as a whole. As in Hoffman and Acosta, there was no error.

Relfe also argues that Hoffman has been abrogated by later cases, State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004); State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003); State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002); State v. Eastmond, 129 Wn.2d 497, 919 P.2d 577 (1996). But none of these cases call into question the clear rule stated in Hoffman and Acosta.

### Third Degree Assault

Relfe's trial counsel proposed an instruction on third degree assault. The

trial court refused to give the instruction, reasoning that Relfe was either guilty of first or second degree assault, or he was not guilty by virtue of acting in self-defense. The State and Relfe correctly agree that the legal prongs of the test for an inferior degree offense are met. Third degree assault is an inferior degree offense of first degree assault. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). At issue here is the factual prong, i.e., whether there is evidence that Relfe committed only third degree assault.

Third degree assault requires proof of criminal negligence and resulting bodily harm under circumstances not amounting to assault in the first or second degree; intent is not an element of third degree assault. RCW 9A.36.031(1)(d), (f). Relfe admitted that he picked up the gun off the passenger seat, pointed it at Lee, and fired it in order to scare him. Relfe did not say that the gun went off accidentally. “Any assault with a deadly weapon is at least a second degree assault.” State v. Walther, 114 Wn. App. 189, 192, 56 P.3d 1001 (2002). Because Relfe intentionally assaulted Lee with a firearm, the facts do not support an inference that he acted with criminal negligence and committed only third degree assault.

Moreover, because the jury was instructed on both first and second degree assault, the jury was not faced with an all or nothing approach. The jury’s finding that Relfe committed first degree assault is incompatible with a finding that he committed only third degree assault. See State v. Hansen, 46 Wn. App. 292, 297, 730 P.2d 706 (1986), aff’d as modified by 737 P.2d 670

(1987) (where jury was instructed on first and second degree kidnapping, failure to instruct on unlawful imprisonment was harmless error because jury's verdict on highest offense was implicit rejection of all lesser included offenses).

### Prosecutorial Misconduct

Relfe contends that the prosecutor misstated the law of self-defense in closing argument, creating the prejudicial inference that Relfe had a duty to retreat. Relfe points to the prosecutor's statement, "[T]he defendant's definition of what justifies a man in shooting another man is not the law's definition. You've been given the law's definition[, which] requires that the defendant is in actual danger."<sup>1</sup> Relfe also points to the prosecutor's rebuttal argument that "all the defendant had to do was sit and wait a moment longer (inaudible) and no one would've been shot."<sup>2</sup>

Although defense counsel objected several times during the State's closing on the ground that the prosecutor mischaracterized the facts, defense counsel did not object to the argument Relfe now challenges on appeal. Relfe must establish that the prosecutor's argument was both improper and prejudicial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Hartzell, 153 Wn. App. 137, 160, 221 P.3d 928 (2009). Because defense counsel did not object, Relfe must establish that the alleged misconduct was "so flagrant and ill intentioned that no curative instructions could have obviated the prejudice

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<sup>1</sup> Report of Proceedings, October 20, 2008, at 52.

<sup>2</sup> Report of Proceedings, October 20, 2008, at 113.

engendered by the misconduct.” State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); Hartzell, 153 Wn. App. at 161. We review the alleged improper argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998).

Self-defense is proper when a person reasonably believes he is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than necessary. RCW 9A.16.020. Self-defense is evaluated by the jury both objectively and subjectively. State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The objective portion of the evaluation requires the jury to determine what a reasonably prudent person similarly situated would have done. The subjective perspective requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her. State v. Janes, 121 Wn.2d at 238. The degree of force used in self-defense “is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant.” State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

The State acknowledges that the prosecutor’s statement that Relfe had to be in “actual danger” is a misstatement of the law. But the jury was properly instructed on self-defense, including that a defendant does not have a duty to retreat, and both the prosecutor and defense counsel quoted the self-defense

instructions and relied on them in closing. The challenged statements were only a small part of a lengthy closing argument. And defense counsel argued that actual danger is not required for the use of force to be lawful and reiterated that Relfe did not have a duty to retreat. Other than the improper “actual danger” misstatement, the prosecutor emphasized that Relfe’s actions were not necessary under the circumstances, which is well within the instructions. Considered in context of the total argument, the issues in the case, the evidence, and the jury instructions, Relfe has not established that the prosecutor’s argument was so flagrant and ill intentioned that no curative instructions could have obviated the prejudice.

#### Firearm Enhancement

Relfe contends that because use of a firearm is an element of first degree assault, imposition of a mandatory five year firearm enhancement constitutes double jeopardy. The Washington Supreme Court recently rejected the identical argument. State v. Kelley, No. 82111-9, 2010 WL 185947 (Wash. Jan. 21, 2010).

#### Sufficiency of the Evidence

In his pro se statement of additional grounds for review, Relfe challenges the sufficiency of the evidence, arguing that the State failed to prove the element of great bodily harm. Relfe asserts that he was in fear for his life, pointing out that Lee was a younger and larger man, and that Lee suffered no permanent



disfigurement. The argument fails.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, a rational trier of fact could find the essential elements of

the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences reasonably drawn therefrom. Salinas, 119 Wn.2d at 201.

A person is guilty of assault in the first degree if, with intent to inflict great bodily harm, he assaults another with a firearm. RCW 9A.36.011; State v. Pedro, 148 Wn. App. 932, 951, 201 P.3d 398 (2009). Specific intent can be inferred as a logical probability from all the facts and circumstances. Pedro, 148 Wn. App. at 951. The jury was instructed that "[g]reat bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ."<sup>3</sup> Pointing a gun at a person and then firing is sufficient to establish intent to inflict great bodily harm. See State v. Hoffman, 116 Wn.2d at 84-84 (jury was entitled to find defendant acted with intent to kill from fact that he shot at victims); Pedro, 148 Wn. App. at 951-52 (rational trier of fact could conclude that defendant acted with intent to inflict great bodily harm by shooting in the direction of victim). Moreover, Lee's injuries required immediate and subsequent surgery, and the physician who treated Lee testified that Lee's wounds were life threatening. Viewing the evidence and reasonable inferences in the light most favorable to the State, there was sufficient evidence for a

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<sup>3</sup> Instruction 13, Clerk's Papers at 77.

rational jury to find that Relfe assaulted Lee with intent to commit great bodily harm.

Affirmed.

Becker, J.

WE CONCUR:

San, J.

Cox, J.